STATE OF MICHIGAN

COURT OF APPEALS

ERIN A. NICOL, a Minor, by his Next Friend, PAMELA J. MAPLE,

Plaintiff-Appellant,

v

SINAI HOSPITAL OF DETROIT, an assumed name for SINAI HOSPITAL OF GREATER DETROIT,

Defendant-Appellee.

UNPUBLISHED
April 16, 1999

No. 207831
Wayne Circuit Court
LC No. 96-643451 NH

Before: Gribbs, P.J., and Griffin and Wilder, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting defendant summary disposition pursuant to MCR 2.116(C)(7). We affirm.

Plaintiff filed suit on behalf of her minor son against defendant on October 15, 1996, alleging medical malpractice. In response, defendant filed a motion for summary disposition under MCR 2.116(C)(7) asserting that plaintiff's claim was barred by the doctrine of res judicata. Plaintiff had previously filed an action against defendant on March 30, 1987, which was dismissed with prejudice by stipulation of the parties. On appeal, plaintiff maintains that the trial court erred in granting defendant's motion for summary disposition. We disagree.

A trial court's grant or denial of a motion for summary disposition is reviewed de novo on appeal. *Limbach v Oakland Co Bd of Co Road Comm'rs,* 226 Mich App 389, 395; 573 NW2d 336 (1997). A motion for summary disposition pursuant to MCR 2.116(C)(7) may be granted on the ground that a moving party is entitled to judgment as a matter of law. *Traver Lakes Community Maintenance Ass'n v Douglas Co,* 224 Mich App 335, 338; 568 NW2d 847 (1997). The Court must accept the plaintiff's allegations as true and construe them in a light most favorable to the plaintiff. *Id.* at 340. The Court should consider all affidavits, pleadings, depositions, admissions and documentary evidence submitted. *Id.* A motion should only be granted where no factual development could provide a basis for recovery. *Id.*

The applicability of res judicata is a legal question that this Court reviews de novo. *Bergeron v Busch,* 228 Mich App 618, 620; 579 NW2d 124 (1998). The doctrine of res judicata precludes a subsequent lawsuit when a party demonstrates that (1) the prior action was decided on the merits, (2) the matter contested in the second case was or could have been resolved in the first case, and (3) both actions involved the same parties or their privies. *Id.* at 621. This Court has held that a voluntary dismissal with prejudice acts as an adjudication on the merits for purposes of res judicata. *Limbach, supra* at 395.

In this case, plaintiff's initial suit was voluntarily dismissed with prejudice pursuant to a stipulation by the parties. Therefore, the prior lawsuit was decided on the merits. In addition, both of plaintiff's complaints alleged medical malpractice resulting in the minor's cerebral palsy and developmental problems. Though plaintiff argues that the factual basis for the claims are distinct – the initial complaint alleged that an unsterilized needle caused an infection, while the second complaint alleged that the hospital neglected to treat the minor for hypoxia – the doctrine of res judicata applies broadly to include all claims which are actually raised as well as those which *could have been raised* in the earlier action. *Bergeron, supra* at 621; *Brownridge v Michigan Mutual Ins Co,* 115 Mich App 745, 747; 321 NW2d 798 (1982). Plaintiff's present cause of action accrued at the time she filed the initial suit because she had the information regarding the treatment of the minor's hypoxia at the time the original suit was filed. In fact, plaintiff does not argue otherwise on appeal. Thus, since both of plaintiff's actions arose out of the medical treatment the minor received, both actions arose out of the same transaction and occurrence and could have been alleged in the prior suit. Finally, there is no dispute that the parties to the present case are the same as in plaintiff's previous suit. Therefore, plaintiff's claim was properly dismissed as it is barred by the doctrine of res judicata.

Plaintiff next argues that the trial court abused its discretion in denying plaintiff's request to set aside the prior judgment. Plaintiff argues that she is entitled to reinstate the previous suit so that it may be dismissed "without prejudice" instead of "with prejudice." We disagree. MCR 2.612(C)(1)(f) provides:

> On motion and on just terms, the court may relieve a party or the legal representative of a party from a final judgment, order, or proceeding on the following grounds:
>
> ***
>
> (f) Any other reason justifying relief from the operation of the judgment.

In order to receive relief from judgment under subsection (f), three requirements must be met: (1) relief could not have been granted pursuant to any other subsection of MCR 2.612(C)(1); (2) the rights of the opposing party must not be detrimentally affected; and, (3) the moving party must demonstrate extraordinary circumstances entitling it to relief. *McNeil v Caro Community Hosp,* 167 Mich App 492, 497; 423 NW2d 241 (1988). Generally, relief is granted when the party in whose favor the judgment was rendered is guilty of misconduct. *Id.*

Here, plaintiff's motion for relief could have been brought pursuant to MCR 2.612(C)(1)(a), which provides that relief may be granted due to "mistake, inadvertence, surprise, or excusable neglect." However, in order to prevail under subsection (a), a motion for relief from judgment must be brought within one year of the judgment. MCR 2.612(C)(2). At oral arguments in the circuit court, plaintiff's counsel stated:

> This was a mistake by – this was most likely a mistake or inadvertent – something that was done inadvertently when it should have been dismissed without prejudice, when, in fact, it was dismissed with. I have had a conversation with the attorney that did this and she said there's no way – she wouldn't give me an affidavit for reasons that I can understand, but she said there was no way she would have done this with prejudice.

In addition, in her brief on appeal, plaintiff states that, "[a]s the only bar to the present action is Plaintiff's inadvertent stipulation to the use of the phrase 'with prejudice' in the order dismissing the earlier suit, then the Circuit Court should have reformed its earlier order to reflect the true intent of the parties and to allow a suit seeking the best interests of Plaintiff Minor to proceed." Plaintiff is estopped from using MCR 2.612(C)(1)(f) where subsection (a) applies. The mere fact that plaintiff failed to bring the motion within one year of the judgment does not entitle her to subsequently bring the motion under the "catch-all" of subsection (f). *McNeil, supra* at 497.

Moreover, resurrection of the old case would substantially and detrimentally affect defendant's rights. A defendant has the right to rely on the finality of a court's judgment and should not be asked to engage in repetitive litigation. *Bergeron, supra* at 620-621. The instant case is over ten years old. Plaintiff has not shown any reason for why she failed to bring a motion for relief from judgment at an earlier point in time. Defendant would be unduly prejudiced if plaintiff were allowed to bring her claim some ten years after the alleged malpractice, particularly because witnesses and evidence would be difficult to obtain after such an extensive lapse of time.

Finally, plaintiff has simply failed to show that extraordinary circumstances exist which mandate relief from judgment. The plaintiff in *McNeil* argued the same facts as plaintiff does in the instant case – that there was never any authorization of a dismissal with prejudice. This Court in *McNeil* determined that this was not an extraordinary circumstance. *McNeil, supra* at 498. Similarly, plaintiff here is not entitled to relief from judgment.

Affirmed.

/s/ Roman S. Gribbs
/s/ Richard Allen Griffin
/s/ Kurtis T. Wilder